No. 93-1631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner,

v.

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT

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MISCELLANEOUS

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BRIEF FOR RESPONDENT

This case challenges a categorical ban on consumer information that is concededly truthful, important, and not even potentially misleading. Two courts found there was "no evidence" to justify the ban. The government, which conceded in its initial answer that the ban violates the First Amendment, subsequently asserted different interests at each stage of the proceedings in a continuing effort to find a justification for a law that has none. For the reasons that follow, the judgment below should be affirmed.

STATEMENT

A. Statutory Scheme

Shortly after the repeal of prohibition, Congress enacted the Federal Alcohol Administration Act (FAAA) of 1935. 49 Stat. 981-985, 27 U.S.C. § 201 *et seq.* Section 5(e)

of the Act regulates the labeling of alcohol beverages. 27 U.S.C. § 205(e).[1] Section 205(e)(2) *requires* disclosure of the alcohol content of distilled spirits and wine. But the very same provision *prohibits* disclosure of the alcohol content of malt beverages, unless state law affirmatively requires disclosure. *Id.*[2] The Act separately regulates advertising. Section 205(f)(2) prohibits statements of alcohol content in advertisements, but only in states that also prohibit such advertisements as a matter of state law. 27 U.S.C. § 205(f)(2).[3] The advertising provision is not at issue here.

Section 205(e) was expressly enacted to "provide the consumer with adequate information" about alcohol products, and to prevent consumer "deception." 27 U.S.C. § 205(e). The House Report explained that the provi-

[1] Violation is a misdemeanor punishable by a fine of up to $1000 per offense. 27 U.S.C. § 207.

[2] During the pendency of this litigation, the Bureau of Alcohol, Tobacco, and Firearms adopted a regulation that permits malt beverage labels to state that the beverage is low alcohol," "non-alcoholic," or "alcohol-free." 27 C.F.R. § 7.26(b)-(d). No court has considered whether this regulation is authorized by the statute, which provides that "statements of . . . alcoholic content of malt beverages are prohibited."

[3] According to the government, the FAAA prohibits alcohol content labeling on malt beverages unless states affirmatively *require* disclosure, but prohibits alcohol content advertising of malt beverages only in states which impose similar restrictions. The government notes that Respondent has not challenged this interpretation. Pet. Br. 6 n. 4. That is not because Respondent agrees with it. Indeed, the statutory text states that both the labeling and the advertising bans apply only in states that impose similar restrictions. 27 U.S.C. § 205(f). And the Conference Report states that limiting the application of these provisions was the compromise reached between the House bill, which regulated malt beverages, and the Senate bill, which did not. *See* 79 Cong. Rec. 14565 (1935). However, resolution of that statutory interpretation question would not afford Respondent the full relief it sought below and would not avoid the necessity of reaching the First Amendment question before this Court.

sion was needed to "prohibit labeling . . . that is false [and to] provide for the prevention of deception of the consumer with respect to the product or its quality." H. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935) [hereafter "H. Rep."]. In presenting the bill to the full House, the chair of the responsible subcommittee stated that the "labeling and advertising requirements [are] designed to prevent deception of the consumer." 79 Cong. Rec. 11714 (1935) (Rep. Cullen).

B. Proceedings in This Case

In April 1987, Respondent Coors Brewing Company (Coors) submitted applications to the Bureau of Alcohol, Tobacco and Firearms (ATF), seeking nationwide approval of labels and advertising that simply disclosed the factual alcohol content of Coors Banquet beer and Coors Light beer. Applying Sections 205(e) and 205(f), ATF rejected the applications. J.A. 60-65. Coors challenged ATF's decision in federal court, arguing that the agency's rejection of its applications violated the First Amendment. J.A. 54-59. Coors did not challenge the government's power to prohibit manufacturers from using value-laden *descriptive* terms such as "strong" or "high test" to promote their products. Nor did Coors challenge the government's power to regulate the type size, placement, or method of calculating disclosures. Pet. App. 7a-8a, & n.5; J.A. 131. Coors challenged the statutory provisions only to the extent they banned truthful, verifiable, and non-misleading *factual* information about alcohol content. *Id.*

The defendants (the Secretary of the Treasury and the Director of ATF) conceded in their answer that the bans violated the First Amendment. Pet. App. 13a. Thereafter, the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives intervened to defend the provisions, arguing that factual disclosure of the alcohol content of malt beverages is inherently misleading.

On cross-motions for summary judgment, the district court held the challenged provisions unconstitutional, as applied, under *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557 (1980). Pet. App. 51a-54a. The court found that the alcohol content of malt beverages "can be very clearly pinpointed" with modern brewing technologies, and therefore that disclosure of numerical information is not inherently misleading today, even if it had been in 1935. Pet. App. 47a. The court also found that consumers have a substantial interest in receiving information about alcohol content in order to make more responsible decisions, and that far less restrictive regulations could prevent consumer deception. It therefore enjoined enforcement of the challenged aspects of the FAAA provisions. Pet. App. 47a, 50a, 54a.

On appeal, the intervenor defendant dropped its claim that Sections 205(e) and (f) were needed to prevent misleading speech, and Petitioner (who had joined in the appeal) expressly acknowledged that "accurate and specific statements of alcohol content" would not be misleading. Pet. App. 15a n.2; Pet. Br. 20 n.16. These appellants instead argued that the government's interest was avoiding "strength wars" among brewers. Pet. App. 18a. The court of appeals, concluding that the government's newly asserted interest might support the continuing validity of the provisions, remanded for an evidentiary hearing. Pet. App. 31a.[4]

On remand, Coors proved that disclosing alcohol content on labels would not produce strength wars. Coors showed that American consumers overwhelmingly prefer moderate and low strength malt beverages. Coors also showed that the states and countries that *require* disclosure had not experienced any strength wars among brewers. Pet. App. 8a. As one expert testified:

> the whole basis of the US government's position, as I understand it, is that putting alcohol by volume on a can creates strength wars. And what I'm trying to tell you is that those places that have done it haven't had strength wars. . . . a strength war is fantasy.

J.A. 177, 173 (Ambler). Coors established that no strength wars have occurred in Canada, the United Kingdom, France, Germany, Belgium, Ireland, Portugal, Spain, Luxembourg, Holland, Germany, Denmark, Greece, Australia, New Zealand, or Norway—all of which require such disclosures. J.A. 140-45, 189, 195-96, 205 (Ambler). An ATF representative testified that the ATF was not aware of any strength wars in states that require disclosures. J.A. 104-05 (Black).

The government presented evidence that some "malt liquor" manufacturers had used value-laden *descriptive terms* such as "Tower of Power" to market their products in the United States. J.A. 210-14 (Cates). But the testimony also established that, even though the government has long permitted "malt liquor" to use that special name—which signals higher alcohol content (Pet. Br. 30; Nelson Dep. 81-82, 92, 111; J.A. 216 (Cates))—malt liquor is and always has been a fringe product, with "approximately three percent of the malt beverage market." Pet. App. 7a; J.A. 216 (Cates).

Finding *no* evidence that simply disclosing *factual* alcohol content on labels would promote strength wars, the district court held the labeling ban unconstitutional. Pet. App. 35a, 38a. On appeal from that judgment, the court of appeals affirmed. It agreed "that the Government had offered *no evidence* to indicate that the appearance of *factual* statements of alcohol content on malt beverage labels would lead to strength wars," and ruled that the ban did not advance the government's asserted interest in avoiding strength wars in a direct and material way, as required under *Central Hudson*. Pet. App. 9a (emphasis added).

[4] The intervenor defendant withdrew after the appeal.

SUMMARY OF ARGUMENT

Section 205(e)(2) criminalizes the disclosure of consumer information that is concededly truthful, factual, and important. Consumers have a substantial interest in receiving information about alcohol content in order to make more responsible decisions. Suppression of that information is not justified by the interest the government asserted below (avoiding strength wars) or by the new interest asserted here (avoiding strength wars in a manner that facilitates state regulation of alcohol).

1. The government has not shown that this ban directly and materially advances either interest, as required under *Central Hudson, Edenfield v. Fane,* 113 S. Ct. 1792 (1993), and *Ibanez v. Florida Bd. of Accountancy,* 114 S. Ct. 2084 (1994).

a. Section 205(e)(2) cannot be upheld on the basis of the record before Congress because Congress made *no legislative findings* regarding the provision, and the legislative history does not indicate that Congress enacted the ban to prevent strength wars. Congress expressly stated *in the statute* that Section 205(e) was intended to prevent consumer deception, and the government concedes the ban cannot be defended on that ground.

b. Section 205(e)(2) cannot be upheld on the basis of the evidence submitted to the district court. To the contrary, the evidence overwhelmingly shows that the labeling ban does not advance the government's asserted interests. No strength wars have occurred in states and countries that require or permit alcohol content disclosures on malt beverage labels. Even the ATF agrees that such disclosures will *not* lead to strength wars. Further, the ban does not advance the government's newly-fashioned interest in facilitating state regulatory choices. Rather, as construed by ATF, Section 205(e)(2) prohibits alcohol content labeling on malt beverages even in states that permit and encourage disclosure as a matter of state policy.

c. Section 205(e)(2) cannot be upheld on the basis of a purported "common sense" assumption that advertising will increase demand. *Cf. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328 (1986); *United States v. Edge Broadcasting,* 113 S. Ct. 2696 (1993). Whatever its force generally, that assumption has no application here. It is no more a matter of common sense that disclosure of alcohol content will cause consumers to choose malt beverages with more alcohol than that disclosure of sugar content will cause consumers to choose cereals with more sugar. The link between disclosure of product traits and demand is much more complicated, and depends on whether consumers will want more or less of a particular trait, or will value a particular trait more or less than other traits. The district court made, and the Tenth Circuit affirmed, factual findings on that very issue, and concluded that consumers overwhelmingly prefer lower and moderate strength malt beverages. Pet. App. 37a.

2. Section 205(e)(2) also suppresses substantially more speech than necessary. *See Board of Trustees of SUNY v. Fox,* 492 U.S. 469, 479 (1989); *Central Hudson,* 447 U.S. at 565. The government could advance its asserted interests *directly,* more easily, and more effectively without suppressing any speech whatsoever simply by prohibiting the manufacture or sale of malt beverages with a higher than specified alcohol content, except in states that permit stronger malt beverages. Alternatively, the government could effectively advance its asserted interests with a considerably narrower regulation of speech —such as a prohibition of marketing malt beverages by touting alcohol strength (as other countries have successfully done) or a ban on label disclosures of alcohol strength in the "malt liquor" segment of the market.

3. Unable to prevail under settled legal standards, the government urges the Court to eliminate the protections of the commercial speech doctrine. There is no reason to

adopt the highly deferential standard of review the government urges.

a. The government's claim that extra "deference" is due Congress's regulatory choices whenever Congress restricts speech about activities that could be deemed "socially harmful" should be rejected. Whether conduct may be "socially harmful" is relevant to the substantiality of the government's interest, not to whether the chosen regulatory method will directly and materially advance that interest in an appropriately tailored way. Moreover, adopting the test urged by the government would involve the courts in endless policy judgments. It would also virtually eliminate First Amendment protection for commercial speech because nearly every suppression of speech could be cast as an effort to reduce socially harmful activities.

b. The Twenty-first Amendment does not require special deference here. The Twenty-first Amendment grants no power to the *federal* government, and thus cannot modify in any way the normal operation of the First Amendment as a constraint on Congress. And it is settled, even with respect to *state* power, that the Twenty-first Amendment does not limit or modify any constitutional provision other than the Commerce Clause. The Court has held that the Twenty-first Amendment does not alter the standard of review under the Equal Protection Clause, or under the Establishment Clause of the First Amendment, and there is no reason why it should alter the standard of review under the Free Speech Clause of the First Amendment. Accordingly, the Twenty-first Amendment would not alter the First Amendment standard of review otherwise applicable to a *state* law prohibiting disclosure of alcohol content on labels.

ARGUMENT

The government concedes that the alcohol content of a malt beverage is factual information that can be accurately measured and disclosed, and that the information at issue here is truthful and not misleading. Pet. App. 15a n.2, 47a; J.A. 68, 101; *see also* J.A. 243 (Patino).[5] Furthermore, as the Tenth Circuit found, this is information "consumers have a substantial interest in knowing." Pet. App. 15a. Consumers are interested in this information *after* purchase, as well as before, in order to make more responsible choices about how much to drink. *Cf. Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

Suppression of such factual information "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield*, 113 S. Ct. at 1798. Thus, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* To overcome this presumption favoring disclosure, the government must advance "substantial" interests, and must carry the burden of proving that the ban it seeks to uphold "advances these interests in a direct and material way," and is not substantially more extensive than necessary. *Edenfield*, 113 S. Ct. at 1798. That burden is particularly heavy where, as here, the government does not seek to prevent

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[5] *Amicus* Center for Science in the Public Interest's claim that the blanket prohibition is necessary to prevent misleading disclosures is belied by its admission that "[i]deally, we would hope that Congress would enact legislation requiring that labels fully and completely inform consumers about the alcohol content of all alcoholic beverages." CSPI Br. 17. By its own admission, CSPI's concern would be eliminated if ATF adopted regulations requiring disclosure of alcohol content by serving size. *Id.* CPSI's concern is thus irrelevant to this case because, as noted *supra*, Coors has not challenged the government's power to regulate the form of disclosure, only the government's power to compel total silence.

or correct potentially misleading speech, but instead seeks to promote public ignorance about completely accurate information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Bolger*, 463 U.S. at 73-74.

I. THE GOVERNMENT HAS NOT SHOWN THAT THE BAN DIRECTLY AND MATERIALLY ADVANCES ITS ASSERTED INTEREST IN DETERRING STRENGTH WARS.

The government has not borne its burden of "demonstrat[ing] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 113 S. Ct. at 1800. The government tries first to avoid its evidentiary burden altogether by asking the Court to defer to posited but non-existent congressional findings. It then asks the Court to reweigh the factual record and reject the findings of two lower courts. Finally, it asks the Court to accept as "common sense" its asserted connection between label disclosures and strength wars, even though the evidence showed there was no such connection. All three attempts fail.

A. No Deference Is Due Congress Here.

The government's principal argument is that "congressional findings" provide a constitutionally adequate foundation for Section 205(e)(2), even if the evidentiary record in this case does not. Pet. Br. 2, 6, 19 n.15, 21, 25, 28, 31-32. That argument fails. Whatever deference is owed to congressional findings generally, none is warranted here because the enacting Congress *made no findings* of any kind, much less findings that support an interest in preventing strength wars. *See Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("Beyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law, our answer is

that the congressional record contains *no legislative findings* that would justify" deference) (emphasis added).

The statutory text itself makes clear that Congress enacted Section 205(e) to deter misleading and deceptive claims about alcohol content in malt beverages, 27 U.S.C. § 205(e), and the government has conceded that Section 205(e)(2) cannot be defended on that basis. Pet. App. 15a n.2. The House Report's discussion of the labeling and advertising provisions likewise emphasized that their purpose was "prevention of deception of the consumer" and prevention of statements "likely to mislead the consumer." H. Rep. at 12. In discussing the specific provision applicable to malt beverages, the Report expressed a concern with advertising that used numerals or symbols to "suggest" alcohol content, noting that "[u]sually such representations of excess alcoholic content are false" or misleading. H. Rep. at 12.[6] When the bill was introduced on the floor of the House, it was described as an effort "to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by *dishonest* labeling and advertising." 79 Cong. Rec. 11714 (1935) (Rep. Cullen) (emphasis added).

Notably, the government *does not provide a single citation referring to strength wars* from the congressional hearings, floor debate, committee reports, or the text of the FAAA itself. That is doubtless because nothing in those sources suggests that Congress enacted the labeling

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[6] The House Report and the labeling and advertising provisions all use the phrase "irrespective of their falsity" to refer to statements which, although literally true, are misleading. H. Rep. at 12-13; 27 U.S.C. § 205(e), (f). The statute explains that Treasury is to prescribe labeling regulations "as will prohibit *deception* of the consumer with respect to such products . . . and as will prohibit, *irrespective of falsity*, such statements . . . as the Secretary of the Treasury finds to be likely to *mislead* the consumer." 27 U.S.C. § 205(e)(1) (emphasis added); *see also* 27 U.S.C. § 205(f)(1).

ban to curb strength wars. Nor does the record before Congress establish that Congress had a basis for predicting strength wars if malt beverage labels simply carried factual disclosures of alcohol content. *Cf.* Pet. Br. 28. In fact, the government is not relying on the legislative history of the FAAA at all, but on the 1934 hearing before the Federal Alcohol Control Administration (FACA), which adopted regulations that were *replaced* by the FAAA. There is no reference in the *congressional* record to that hearing.

In any event, that hearing does not begin to justify the government's position. The hearing on FACA's proposed "Misbranding Regulations, Series 9" focused (as the name suggests) almost exclusively on the risks of consumer deception.[7] Several witnesses complained that brewers were using numerals as product identifiers, such as "6" or "number 9 beer," that had *nothing to do* with the amount of alcohol in the beer but would be misunderstood as claiming to be 6 percent or 9 percent alcohol.[8] There was also testimony that some brewers had made false claims about alcohol content.[9] Witnesses also testified

[7] *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (hereafter "Misbranding Hearing") (cover of draft regulations) (Nov. 1, 1934).

[8] *See* Misbranding Hearing at 7 (McCabe) (complaining that brewers were using "all sorts of numbers and figures, numerals, to convey the impression that the beer contained an excessive amount of alcohol which it did not contain"); *id.* at 29 (Jackman) (complaining of "fraudulent . . . statement, such as you have on [the label] with the figure 6, for example, which leads somebody to believe that that is the alcoholic content"); *id.* at 63 (Black) ("the prohibition of the use of numerals aims at misleading statements as to the alcoholic content"); *id.* at 65 (Mulvihill) (describing beer with the "misleading" label "9 Mule Brand").

[9] Misbranding Hearing at 31-32 (Jackman) (discussing "a beer [claiming] a 12 per cent proof spirit, that analyzed . . . just slightly over 4 by volume").

that no brewer could accurately state the alcohol content of its beer within reasonable tolerances. Because of variations in the malt, atmospheric pressure, and temperature, alcohol content could vary from 3.2 to 4.5 percent from the same brewer using the same malt, and "the brewmaster has absolutely no control." [10]

Virtually all of the testimony at the FACA hearing focused on deception. Ignoring that testimony, the government seizes on isolated comments by one witness. In addition to testifying, as others had, that brewers were deceiving the public, and that malt beverages could not be labeled accurately, that witness also testified that he *believed* malt beverages would have lower alcohol content if they carried no alcohol content labeling at all. Misbranding Hearing at 33 (Jackman).[11]

[10] Misbranding Hearing at 27-28 (Jackman) (explaining that if brewers "were required to place upon our labels a statement to the effect that this beer contains 4 per cent of alcohol by volume, it just wouldn't be true and could not be done" and that this "is the consensus of opinion of the brewmasters and the brewery chemists."); 28 (Lutz) (agreeing that exact alcohol content was almost impossible to control).

[11] Mr. Jackman's prediction of a relationship between nondisclosure and low alcohol content was not based on studies or even anecdotal evidence. In contrast, his statements about mislabeled beer were based on chemical analyses. Not surprisingly, the government relies less on Mr. Jackman's actual testimony than on the Tenth Circuit's mischaracterization of it. Pet. App. 6a, citing Pet. App. 18a. In the hearing transcript where the first Tenth Circuit decision purports to find testimony that labels displaying actual alcohol content resulted in a strength war in which producers put increasing amounts of alcohol in their beer, Mr. Jackman actually testified that beer cannot be made that is high enough in alcohol content to do any damage, that most beers in this country were approximately 3.3% alcohol, that ale and beer are fermented differently, and that he favored a prohibition of alcohol content disclosures and of any other numerals on beer labels. Misbranding Hearing at 34-38. Mr. Jackman also testified that the stronger beer on the market had approximately 4.4% to 4.5% alcohol content by volume, *id.* at 25, that the highest alcohol content he had found was 4.86%, but that the brewer had not realized his beer

There is no reason to believe that isolated remarks by one witness at an agency hearing had anything to do with Congress's decision the following year to impose the labeling ban. Indeed, that testimony does not appear even to have been a basis for FACA's precursor regulations. To the contrary, FACA explained that its regulations were adopted:

> [i]n order that the consumer may have adequate information as to the character of the product, and that members of the industry may be protected from unfair competition incidental to marketing of brewery products under labels which contain deceptive, untruthful or incomplete data.[12]

And when FACA's Chairman later testified before Congress, he explained that FACA's labeling and advertising regulations:

> were intended to insure that the purchaser should get what he thought he was getting, that representations both in labels and in advertising should be honest and straightforward and truthful.

Hearings before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 10 (June 19-20, 1935). There were also references during the *congressional* hearings to "frauds upon the public by false labels" on distilled spirits.

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was that high and told Mr. Jackman he would "cut it down." *Id.* at 26. The *only* testimony Mr. Jackman gave drawing a link between label disclosures and higher strength beer was entirely speculative. *Id.* at 33, 73.

In addition, the government refers out of context to the testimony of another witness, Alexander H. Bell. Mr. Bell testified to one anecdote about a local brewer who had met competition by increasing "the alcoholic content of the beer *to some extent*" but then explained that "the brewers of this country . . . are now rapidly coming to the conclusion that beer should contain a low amount of alcohol." *Id.* at 59-60.

[12] Issuing announcement for the *Regulations Relating to the Labeling of Domestic Products of the Brewing Industry* (Jan. 15, 1935) (attached as appendix to Misbranding Hearing).

See, e.g., id. at 127. But there was *no* testimony before Congress that FACA's regulations had been adopted to curb strength wars. The government is attempting to infer Congress's purpose not from the statutory text, or congressional findings, or congressional reports, or floor debate, or congressional hearings, but from statements made by a single private citizen during an earlier agency hearing.[13] That is far too slender a reed to support the government's case. The *only* basis for the labeling provision that can be gleaned from the legislative history is a concern that alcohol content labels on malt beverages might be misleading.[14]

B. The Record Shows That Labeling Would Not Lead To Strength Wars.

Two courts have reviewed the evidence in this case and both have found that:

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[13] Even if Congress had been aware of that citizen's remarks, those remarks could not justify the labeling ban. The remarks were "mere speculation or conjecture," *see Edenfield*, 113 S. Ct. at 1800, and "amount to little more than unsupported assertions without evidence or authority of any kind." *Ibanez*, 114 S. Ct. at 2092.

[14] The government mischaracterizes the Tenth Circuit's decision in alleging that the court disregarded "the historical evidence" because it read *Edenfield* as adopting a "much stricter" standard than *Central Hudson*. *See* Pet. Br. 28 n.21. To the contrary, the Tenth Circuit relied on *Edenfield* as confirming the continued vitality of a standard that is "much stricter than the 'reasonably believed' standard the *Government* would have us adopt." Pet. App. 5a (emphasis added). The government further mischaracterizes the Tenth Circuit's decision in alleging that court "did not question the adequacy of the government's showing that there were strength wars among malt-beverage brewers" when the provision was enacted. Pet. Br. 25. The Tenth Circuit noted merely that the government's assertion about strength wars in 1935 was *supported* by testimony cited in the court of appeals' first opinion in this case, *not* that the testimony was conclusive. Pet. App. 6a. Moreover, the first court of appeals' opinion had not cited testimony before *Congress*, it had cited testimony before *FACA*. Pet. App. 18a. *See Johnson v. De Grandy*, 114 S. Ct. 2647, 2659 (1994) (description of testimony is not a finding).

> the Government has offered *no evidence* to indicate that the appearance of *factual* statements of alcohol content on malt beverage *labels* would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has offered only inferential arguments that are based on mere speculation and conjecture.

Pet. App. 9a (emphasis added).[15] The record simply refutes the government's claim that disclosures of alcohol content on malt beverage labels will lead brewers to increase the strength of their products.[16]

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[15] The district court concluded that "no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote [] alcoholic strength wars. . . ." Pet. App. 38a.

[16] To the extent the government argues here that the lower courts' findings of fact are incorrect, as it did in its Petition For Rehearing to the Tenth Circuit, this Court should follow its long-standing rule not to "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978); *Neil v. Biggers*, 409 U.S. 188 (1972). Here, the government has not claimed, and could not, that an "exceptional" error was made below. The government's attempt to avoid the two-court rule by arguing that the Court should review the facts *de novo*, Pet. Br. 19 n.15, misconstrues First Amendment law. Although an appellate court must independently decide whether the record supports a judgment upholding a *restriction* of speech, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), this Court has never held that *de novo* review of facts is appropriate where a court has *upheld* speech rights. *See Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981 (1988) (denial of *certiorari*). The *de novo* requirement is imposed as a special procedure to make sure speech rights are not suppressed because of unjustified factual findings. But there is no danger that "the judgment . . . constitute[s] a forbidden intrusion on the field of free expression," *Bose Corp.*, 466 U.S. at 508, where, as here, free expression has been protected.

1. *The record shows that consumers prefer moderate and low strength malt beverages.*

The government presents no evidence to support its assertion that simply disclosing factual information about alcohol content on labels would lead consumers to choose higher strength malt beverages than they do now. *Cf. Edenfield*, 113 S. Ct. at 1800. Indeed, the evidence refutes that assertion. As the district court found, "[t]he evidence shows that the high-strength brews do not have the same popular appeal as the low-strength and the light beers, either abroad or in the United States." Pet. App. 37a. In fact, it showed that the fastest growing markets in the malt beverage industry were at the low end of the malt beverage alcohol range: light beers and non-alcohol malt beverages.[17]

The evidence also affirmatively shows that high strength malt beverages would be decidedly unpopular for reasons in addition to consumers' preference for moderation. Increasing the alcohol content of malt beverages unbalances their taste and makes them bitter and heavier. J.A. 228-29, 234-35, 248 (Patino) ("you can't just increase alcohol strength without affecting these other taste characteristics"). Increasing alcohol content also adds calories, and increases costs. J.A. 232-33, 245 (Patino), 286. Thus, "it would be extremely dangerous" for brewers to increase the alcohol strength of their established, mainstream products, J.A. 228 (Patino), and they have compelling economic incentives not to do so. J.A. 266, 268 (Rechholtz). As the Tenth Circuit found, Pet. App. 8a (emphasis added):

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[17] *See* J.A. 116 (Porter) ("Light beer products . . . are growing at a faster rate than the industry in total"), 264-65 (Rechholtz) (Coors' greatest growth in the past ten years is from light and non-alcohol beer, light beer generally is "approaching a third of the market"), 230-31 (Patino) ("[t]he no-alcohol market has been increasing tremendously," "almost two-thirds of [Coors' production] is light beer"); Nelson Dep. 38-39, 84 (light beer is 32% of the market; "the no-alcohol segment of the business has taken off like a rocket").

there is *uncontroverted* evidence that brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers in the United States value taste and lower calories—both of which are adversely affected by increased alcohol strength.

The "malt liquor" evidence on which the government places so much weight does not establish a connection between *factual* alcohol content disclosures and strength wars. Pet. Br. 26, 30. It proves the opposite. Consumers already know that malt liquor has a higher alcohol content than beer. Pet. Br. 30; Nelson Dep. 81-82, 92, 111; *see also* Pet. App. 7a. Nevertheless, whether because of its high alcohol content or its unpleasant taste, malt liquor has been able to garner only 3% of the malt beverage market. Pet. App. 7a, n.4; J.A. 216 (Cates), 285. Further, malt liquor has remained a fringe product even though it has been promoted—through *descriptive* statements—on the basis of alcohol strength. Pet. Br. 30; J.A. 208-214 (Cates); Pet. App. 7a-8a.

Moreover, the Tenth Circuit did not "*fail*[] to explain," Pet. Br. 32 (emphasis added), why the malt liquor evidence was insufficient to sustain the labeling provision when the district court had commented that it would sustain the advertising provision. First, the Tenth Circuit *did* explain why it limited ts review to the labeling provision. Pet. App. 4a-5a. The government, not Coors, appealed from the district court's decision—and only from the part enjoining the labeling provision. *Id.* Furthermore, the district court's comments on the advertising provision were *dicta* because Coors had dropped its challenge to the advertising provision during trial, Tr. at 301, as the Tenth Circuit knew. *See* Coors' Answer Br. in No. 92-1348 at 2. Second, the Tenth Circuit's reasoning—that the malt liquor evidence regarding *descriptive* statements is irrelevant to regulations suppressing *factual* disclosures of alcohol content—strongly suggests that had it been asked to review a decision upholding, on the basis of the malt liquor evidence, the prohibition of such *factual*

disclosure in advertisements, it would have reversed. *See* Pet. App. 7a-8a & n.5.

Finally, because the more alcohol put into a malt beverage product, the rougher and harsher it tastes, Nelson Dep. 18, even in producing a "spectrum" product—aimed at a small segment of the market—the inherent characteristics of brewing ensure that any increases in alcohol content would be very slight.[18] Therefore, even if the government had made an evidentiary showing that alcohol content disclosures would lead brewers to produce stronger malt beverages than are now available—and it did not—that showing would necessarily have been too "marginal" to justify the burden Section 205(e)(2) places on speech. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509-10, 1515 (1993). At most, the government could claim only "paltry gains . . . only the most limited incremental support for the interest asserted." *Id.* at 1509-10, 1515 (quotation omitted).[19]

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[18] Another limitation on the amount brewers could increase alcohol content is that some states impose maximum limits on alcohol strength. *See, infra*, note 37. Unlike the labeling ban, limits on maximum alcohol content effectively prevent production and sale of high strength malt beverages. *See* III.B.1, *infra*.

[19] Nor is it clear what the government hopes to gain from its description of Coors' reason for bringing this litigation. Pet. Br. 36. If the government is correct in presuming that most people think Coors' regular beer is weaker than it really is, then presumably some portion of its customers have chosen that beer at least partially for that reason. Accurate labeling would be expected to cause some of those customers to switch to a beer with a lower alcohol content. Meanwhile, some number of beer-drinkers, who have avoided Coors on the mistaken assumption that it is "weak," will discover that Coors has about the same alcohol content as the beer they currently drink and will switch to Coors for taste reasons. The net effect of the federal prohibition, with respect to Coors, is that consumers are drinking stronger beers than they think. And the net effect of consumer education would be to lower the average alcohol content consumed. Thus, the government's argument actually demonstrates that the labeling ban *disserves* the government's asserted interest. *See* Pet. App. 8a-9a.

2. *Empirical evidence from the many states and countries that permit or require alcohol content labeling on malt beverages demonstrates that labeling will not produce strength wars.*

Most Western countries, and some states, require malt beverage labels to carry alcohol content disclosures. The experience of these jurisdictions uniformly refutes the government's assertions. *See Edenfield*, 113 S. Ct. at 1804 (relying on the lack of problems in states that did not ban in-person solicitation by CPAs). States where alcohol content disclosures are required on the labels of malt beverages have not experienced strength wars. J.A. 104-05 (Black) (ATF is "not aware of any" strength wars in states that require disclosures). Canada, which has required alcohol content disclosures on malt beverage labels since 1976, has not experienced strength wars. J.A. 142-43, 205 (Ambler), 125 (Walker), 114 (Porter).[20]

There is no evidence of strength wars among brewers in the United Kingdom, France, Germany, Belgium, Ireland, Portugal, Spain, Luxembourg, Holland, Germany, Denmark, Greece, Australia, New Zealand, or Norway, even though each country requires that the alcohol content of malt beverages be disclosed on their labels, and prior to that, permitted such disclosure.[21] J.A. 140-45, 181, 189, 195-96, 205 (Ambler). Indeed, the average strength of malt beverages in the European Community and the United States hardly differs, despite their contrasting approaches to disclosure. J.A. 145 (Ambler) (EC mainstream ranges from 3.5 to 5.5 percent), 285 (US mainstream ranges from 4 to 5 percent).[22]

[20] The district court expressly found that "[i]n Canada, where alcoholic content is listed on the cans, there is no evidence of [strength] wars." Pet. App. 36a. Although the transcript says "price" wars, "strength" wars is clearly intended, as the government recognized by including "(sic)" after "price" in the appendix to its Petition. *Id.*

[21] The United Kingdom, for example, has required label disclosures of alcohol content by volume since May 1989, and of alcohol by specific gravity since approximately 1979. J.A. 139 (Ambler).

3. *The agency charged with enforcing the ban does not believe it serves the asserted interest.*

ATF, the agency charged with monitoring the alcohol beverage industry and administering the FAAA, Pet. Br. 12, n.11, does not believe the ban on accurate, factual alcohol content labeling for malt beverages is necessary or useful to prevent strength wars among brewers. ATF has "favored allowing labeling which disclosed the alcoholic content of malt beverages," and has publicly advocated eliminating the ban. J.A. 67 (Defendants' Amended Answer); J.A. 91 (Black); Tr. 70-71 (Cates). ATF even suggested that Coors bring this challenge. J.A. 259 (Rechholtz). Indeed, while this challenge was being tried below, ATF was involved in a project to collect and publish "the alcohol strengths of all malt beverage prod-

[22] The government's attempt below to eke support out of the marginally higher average alcohol content of malt beverages in Canada was properly rejected. Pet. App. 36a. Further, no relevant conclusion can be drawn from the smaller market for light beer in Canada than in the United States, Pet. Br. 33 n.26, because the market for high alcohol malt beverages (malt liquor) in Canada is also correspondingly smaller. J.A. 271 (Rechholtz).

In addition, the government misstates and misconstrues the record in arguing that certain evidence from Britain supports its strength war proposition. Pet. Br. 33 n.26. The testimony to which the government refers was that there have recently been trends toward purchase of better quality malt beverages in Britain and better quality wines in France, accompanied by a decrease in the volume purchased. The testimony further explained that these better quality products happen to be "slightly higher" in alcohol content, but that the difference is marginal and does not account for the purchasing choices. J.A. 175-76, 180, 195-96 (Ambler). Indeed, when armed with alcohol strength information, consumers who choose higher strength products are apparently consuming less of those products. J.A. 158 (Ambler). Furthermore, in Britain, where disclosure is required, the average alcohol content of malt beverages is lower (4%) than in the United States (4.5%). J.A. 167 (Ambler), 285.

ducts in the United States." J.A. 215 (Cates). ATF has that information for most malt beverages, and will give it to any consumer who calls. J.A. 214 (Cates). ATF also permits producers to do so, as long as that information is not on a label or in an advertisement. Pet. Br. 34; J.A. 215, 260, 281-82 (Cates).[23]

The U.S. Department of Health and Human Services (HHS) has likewise recommended that the "alcohol content of all beverages—including beer and malt liquor—[be] clearly displayed" on their labels. J.A. 296. HHS and ATF promulgated the mandatory label regulation that now requires warnings on all alcohol beverages, including malt beverages, stating that consumption of alcohol beverages is discouraged for pregnant women, impairs the ability to drive a car or operate machinery, and may cause health problems. 27 C.F.R. § 16.21.[24] Thus, the agencies with substantive responsibility in this area recognize the inconsistency between warning people that alcohol consumption entails risks, while depriving them of information they could use to better heed that warning.

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[23] Contrary to the government's suggestion, Pet. Br. 34, ATF's willingness to give alcohol content information to the public, or to permit producers to do so outside of the normal channels of commerce, does not justify the prohibition of that information on labels. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Bolger*, 463 U.S. at 69 n.18 (quotation omitted); *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994) ("by eliminating a common means of speaking, [measures foreclosing an entire medium] can suppress too much speech"); *Discovery*, 113 S. Ct. at 1515.

[24] The government acknowledges, however, and numerous studies show, that moderate alcohol consumption significantly reduces the risks of coronary heart disease. *See* Brief *Amicus Curiae* of the Wine Institute (No. 93-1631), at 5, 7. Congress has encouraged federal research on the health benefits of moderate consumption of alcohol. *Id.* at 8.

C. The Link Between Labeling and Strength Wars Is Not Self-Evident.

Lacking any factual support, the government argues that the "common sense" connection between advertising and demand noted in *Posadas* and *Edge Broadcasting* provides a sufficient justification for Section 205(e)(2). But that common sense proposition has no application here, as the court below recognized. Pet. App. 21a. The ban challenged here is a ban on informational disclosures on labels, not on promotional efforts in advertising. And the proposition the government asserts as "common sense" is that providing alcohol content information about the *entire range* of malt beverages will stimulate demand for *high* strength malt beverages.

It is no more a matter of "common sense" that disclosure of alcohol content will induce consumers to choose malt beverages that have more alcohol than it is a matter of "common sense" that disclosure of the sugar content of cereals will cause consumers to choose cereals with more regular, or that listing calories will cause consumers to choose foods with more calories. Indeed, the government failed to prove the very proposition it now asks the Court to accept on faith. The evidence showed that label disclosures would *not* stimulate demand for high strength malt beverages. Pet. App. 38a.

Furthermore, the allegedly "common sense" relationship between label disclosures and strength wars the government posits is not *direct*, as required under the First Amendment.[25] It is extremely attenuated. The government's argument requires the Court to accept that: (1) consumers prefer beverages with higher alcohol content; (2) consumers cannot readily determine which products have higher alcohol content; (3) if consumers could determine the alcohol content of malt beverages through

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[25] *See Central Hudson*, 447 U.S. at 564 (noting that "the Court has declined to uphold regulations that only indirectly advance the state interest involved").

label disclosures, they would choose a higher alcohol malt beverage; (4) if brewers produced malt beverages with higher alcohol content they would increase their sales; (5) brewers would therefore produce stronger malt beverages.

This Court has repeatedly found such indirect rationales inadequate to justify restrictions on commercial speech. *See Virginia Pharmacy*, 425 U.S. at 748 (rejecting ban on advertising drug prices as a means of preventing pressure on pharmacists to lower standards); *Linmark Assocs., Inc. v. Willingboro Tp.*, 431 U.S. 85, 88 (1977) (rejecting ban on "for sale" signs as a means of preventing "panic selling" in an integrated neighborhood); *Central Hudson*, 447 U.S. at 557 (rejecting ban on promotion of off-peak consumption by utility as a means of avoiding increased peak consumption which would lead to inequitable rate increases).

In each case, as here, the government claimed that disclosing accurate, factual information would ultimately result—after a series of altered behavior patterns by both consumers and sellers—in activity the government would prefer to avoid but declined to regulate directly. Here, the activity the government claims it would prefer to avoid is competition among brewers to produce malt beverages with higher percentages of alcohol. But, like the advertising ban held unconstitutional in *Virginia Pharmacy*, the labeling ban "does not directly affect" the alcohol content of malt beverages "one way or the other." 425 U.S. at 769. At most, "it provides only ineffective or remote support for the government's purpose" and cannot be sustained. *Edenfield*, 113 S. Ct. at 1800 (quotation omitted). As this Court has made clear, "[s]uch conditional and remote eventualities simply cannot justify silencing" truthful and accurate product disclosures. *Central Hudson*, 447 U.S. at 569.

D. The Statutory Distinctions Bear No Relationship to the Government's Asserted Interest in Preventing Strength Wars, Which Confirms That Section 205(e)(2) Was Not Enacted For, and Will Not Advance, That Purpose.

The FAAA makes significant distinctions among types of disclosures and forms of communication that bear "no relationship *whatsoever* to the particular interests that the [government] has asserted" here. *Discovery*, 113 S. Ct. at 1514. Section 205(e) *prohibits* disclosure of alcohol content on the labels of malt beverages but *requires* disclosure for distilled spirits and wine over 14 percent alcohol. Both wine and distilled spirits can vary in strength, and both generally have substantially higher concentrations of alcohol than malt beverages. The government defends this provision on the ground that consumer knowledge of alcohol content will create a risk of strength wars. Yet the government has not even suggested a rationale, much less submitted evidence, to explain why this provision *requires* disclosure of alcohol content for products at the *high* end of the alcohol strength spectrum, thus ensuring that anyone interested in drinking beverages with the highest alcohol concentration will be able to identify those beverages. If consumer knowledge of alcohol content creates a risk of strength wars for low strength beverages, why would consumer knowledge of alcohol content not create an even greater risk of strength wars among higher strength products?[26] The statute's distinc-

[26] This distinction is particularly irrational in light of the substantial and undisputed overlap in the markets for beer, wine, and spirits. *See* J.A. 163 (Ambler) (markets for the three types of alcohol products "overlap to a very substantial extent"). Indeed, when ATF adopted regulations to permit alcohol content disclosures on malt beverage labels, in compliance with the district court's injunction, it chose to require that disclosures "use the same units of measurement" as other alcohol beverages so it would "be easier for consumers to compare the alcoholic content of a malt beverage with the alcoholic content of wine and distilled spirits." 58 Fed. Reg. 21229 (April 19, 1993).

tion between malt beverages and stronger alcohol products makes sense only if the statute was intended to prevent deception—its articulated purpose. In 1935, wine and spirits could be produced with alcohol levels within predictably close tolerances, but malt beverages could not. *See, supra,* page 4.

In addition, without explanation, the government interprets the statute to permit high alcohol content malt beverages to carry a special name—malt liquor—*on their labels,* which ensures that anyone interested in drinking high strength *malt* beverages will be able to identify those beverages. Indeed, the government argues that "people who drink malt liquor choose it because of its high alcohol content." Pet. Br. 30.

Finally, the government's interpretation of the statute makes a distinction between advertising and labeling that similarly bears *no* relationship to the government's asserted interest in avoiding strength wars. As interpreted, the advertising ban applies only in states that have imposed similar bans; the labeling ban applies *unless* states affirmatively require disclosure. Pet. Br. 5-6 & n.4. Thus, in 33 states and the District of Columbia, the statute leaves brewers free to advertise alcohol content, but not to place the same information on labels.[27] In most of

[27] As the Statutory Appendix to this brief shows, 33 states and the District of Columbia do not prohibit factual statements of alcohol content in malt beverage advertisements. Therefore, in those jurisdictions the federal advertising prohibition does not apply. Nonetheless, the federal labeling prohibition does apply in those jurisdictions to ban alcohol content disclosures on labels of all or some malt beverages. Sixteen of those jurisdictions neither require nor prohibit alcohol content labeling and, therefore, no malt beverage labels may carry alcohol content disclosures solely because of the federal prohibition. In Oklahoma, no malt beverages may carry factual alcohol content labeling, partly because of a state prohibition (covering malt beverages under 3.2% alcohol by weight) and partly because of the federal prohibition. In Mississippi, malt beverage labels may disclose only that they are less than 4% alcohol by weight (unless foreclosed by federal law). In six states, some alcohol content disclosure is required by state law, but malt beverages not covered by the state disclosure requirement are subject to the federal prohibition. Of these six, Oregon imposes the most extensive disclosure requirement: labels on all malt beverages over 4% alcohol by volume must disclose numerical alcohol content. In another ten states, the federal labeling prohibition *may* apply as state substantive law by incorporation, rather than *ex proprio vigore.*

the country, the statute, as interpreted, prohibits factual disclosure of alcohol content on beer labels even though the alcohol content of the same beer can be stated in television commercials, magazine ads, and store displays *right next* to the bottles and cans themselves.

Like the distinction between commercial handbills and newspapers in *Discovery*, the distinctions drawn here are "an impermissible means of responding to" the government's asserted interest because they are wholly unrelated to that interest. *Discovery*, 113 S. Ct. at 1514. Indeed, the "selective approach" the statute takes to the dissemination of alcohol content information itself "suggests limits on the substantiality of the [government's] interests." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984); *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place."). And here, where the asserted interest in strength wars finds no support in the statutory text or legislative history, the exceptions for wine, distilled spirits, malt liquor, and advertising confirm that the statute was *not* designed to curb strength wars, and will not directly and materially advance that interest.

E. The Government's Newly Asserted Interest in Protecting State Regulatory Policies Cannot Save This Ban.

The government cannot save Section 205(e)(2) by arguing that it is designed to prevent strength wars in a manner that also supports state policies. To begin with, the argument comes too late. Although the government chastises the court of appeals for failing to use "requisite care in identifying the governmental interests" underlying Section 205(e)(2), Pet. Br. 20, the government did not assert this "federalism" interest at any stage of the proceedings below. The court of appeals faithfully followed this Court's directive to "identify with care the interests *the state itself asserts* . . . [and] *not* . . . supplant the *precise interests put forward by the state* with other suppositions." *Edenfield,* 113 S. Ct. at 1798 (emphasis added). The government cannot assert a new interest in this Court, and then claim the Court of Appeals erred in failing to consider it.[28]

In any event, this newly discovered solicitude for the states cannot redeem the statute. Indeed, it is far from clear exactly what the government is now arguing. To the extent Section 205(e)(2) merely parallels state labeling bans, the federal provision could not be constitutional unless the underlying state bans were themselves constitutional. But the government failed to show that any labeling ban would directly and materially advance an interest in curbing strength wars, thus precluding any argument that a state ban would advance such an interest. To the extent the government's federalism argument depends on the *exception* for states that require alcohol disclosure on malt beverage labels, the argument is equally misdirected. The exception might protect Section 205

[28] Because the government asserted this interest for the first time in this Court, it submitted no evidence to support its argument, and Coors had no opportunity to present evidence to show that the ban would not further this interest.

(e)(2) from a Twenty-first Amendment challenge by a state, but it cannot justify Section 205(e)(2)'s *suppression* of expression in states that do not require disclosure.

The government's "border crossing" argument (Pet. Br. 22-23) is particularly difficult to understand. The argument apparently assumes that, as a result of the labeling ban, residents of states that limit the alcohol content of beer will be less likely to travel to a neighboring state to obtain stronger beer because they will be less likely to know the beer is stronger. The government offered no evidence to support this speculation, and there is no reason to believe that residents of states with alcohol content limits would go to the trouble and expense of traveling to another state to find out if the beer there is stronger, instead of simply drinking an extra beer, or drinking wine or spirits in their home state. And this interest would not be advanced at all if neighboring states exercised their option under Section 205(e)(2) to mandate label disclosure. Furthermore, because Congress left *advertising* unregulated in the states (now 33 and the District of Columbia) that do not themselves ban advertising of alcohol content, information about the alcohol content of malt beverages will be freely available even if it is not permitted on labels. Residents of states that limit maximum alcohol content may well be exposed to that advertising by media that cross state borders, and will be exposed to it should they travel to the neighboring states. Finally, quite apart from its implausibility, the "border crossing" rationale, does not respect state sovereignty as a general matter. To the contrary, it sacrifices the interests of states that permit or encourage disclosure in order to protect the interests of states that wish to limit the alcohol content of malt beverages.[29]

[29] The government's reliance on *Arrow Distilleries, Inc. v. Alexander,* 109 F.2d 397 (1940), and similar cases in support of this argument suggests that it misapprehends the nature of this chal-

The government's eleventh hour argument about state prerogatives is a transparent effort to make the present case resemble *Edge Broadcasting*. But *Edge* is inapposite. In *Edge*, the Court upheld a ban on lottery advertising by broadcast licensees located in states that banned lotteries. The federal advertising ban was plainly constitutional within such states because the underlying conduct was unlawful in those states. *See Central Hudson*, 447 U.S. at 566 (commercial speech doctrine does not protect speech proposing an unlawful activity). Although a particular licensee challenged the ban on the ground that it prohibited advertisements for lawful lotteries in neighboring states, the Court held that the only practical, administratively workable way to respect divergent state policies was to require the licensee to follow the policy of its home state.

In contrast, the federal statute at issue here does not respect state authority. As interpreted by the government, it affirmatively imposes a federal ban unless the state enacts contrary legislation. The federal ban governs not only in states that themselves prohibit alcohol content labeling, *but also in states that permit, or even encourage, but do not require, such labeling*. Pet. Br. 5, n.4.[30] States that would encourage alcohol content labeling for consumer protection purposes—but hesitate to impose a state-specific labeling *requirement* because of the cost of compliance or for other reasons—are thwarted from pursuing that policy choice through incentives and negotia-

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lenge. Coors has not argued that the government lacks power under the Commerce Clause to enact the provision in question. Coors' argument is that the provision violates the First Amendment.

[30] Similarly, the federal *requirement* that labels on spirits and wine disclose alcohol content applies even in states that do not want that information disclosed.

tion. The regulatory policies of these states are not promoted by the federal ban; they are obliterated. For example, California's Department of Alcohol Beverage Control recently eliminated its prohibition against disclosing alcohol content on malt beverages exceeding 4% alcohol by weight because it "has concluded that listing the amount of alcohol on malt beverage product labels will result in better informed consumers and mitigate against unknowing excessive consumption." [31]

II. THE GOVERNMENT HAS NOT SHOWN THAT THE BAN IS NARROWLY TAILORED TO ACHIEVE THE GOVERNMENT'S ASSERTED INTERESTS.

Section 205(e)(2) also violates the First Amendment because it is not "a means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480; *see also Discovery*, 113 S. Ct. at 1510, n.12. When, as here, the restriction is "a categorical prohibition against the dissemination of accurate factual information to the public," the First Amendment imposes a particularly "heavy burden of justifying" the restriction—a burden the government has not even remotely carried. *See Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

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[31] *See* Cal. Emerg. Reg., OAL File No. 94-0224-03 E (Feb. 16, 1994). Texas also expressly repealed a prohibition against disclosing alcohol content on malt beverage labels. *See* Tex. Alc. Bev. Code Ann. § 101.41 (West 1994). Maine and Florida expressly permit, but do not require, alcohol content disclosures on malt beverage labels. *See* 1994 Me. Legis. Serv. Ch. 730 (S.P. 614) (L.D. 1712) (WEST); Fla. Admin. Code § 61A-4.006(1). *See* Statutory Appendix to this brief for other examples. The regulatory policies of these states, which include a substantial portion of the total population, encourage alcohol content labeling but their policies are nullified by the federal labeling prohibition. California, Texas and other states are thus wrongly described by the government as states which themselves prohibit or "acquiesce" in the federal labeling ban. *See* Pet. Br. 9-10 & nn. 7-10.

A. Whether the Labeling Ban Is Narrowly Tailored Must Be Carefully Scrutinized.

The government urges this Court to sustain Section 205(e)(2) simply on the basis that Congress "could reasonably have believed" it was sufficiently tailored. Pet. Br. 35. This Court has made clear, however, that the narrow tailoring requirement for commercial speech "is far different . . . from the 'rational basis' test." *Fox*, 492 U.S. at 480. A legislature may *not* adopt a restriction of speech—and particularly not a flat ban—"without reference to whether it does so at inordinate cost. . . . [T]he cost [must] be carefully calculated." *Id.; see Discovery*, 113 S. Ct. at 1510 n.13 (Court has "rejected mere rational basis review . . . in determining whether the 'fit' between ends and means is reasonable").

The fit between ends and means warrants particularly careful scrutiny here for two reasons. First, Congress "has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Discovery*, 113 S. Ct. at 1510. When the FAAA was enacted, statements on product labels were not considered protected speech.[32] Moreover, as we have noted, there is no indication that Congress even had strength wars in mind when it enacted the FAAA. *See supra*, pages 11-15. It follows, *a fortiori*, that Congress did not even consider, much less determine, that the most appropriate way to avoid strength wars would be to prohibit alcohol content labeling of malt beverages. In these circumstances, there is no basis for giving deference to a supposed judgment by Congress about the best means to

[32] *See Metromedia v. City of San Diego*, 453 U.S. 490, 505 (1981) (First Amendment protection for commercial speech first recognized in 1975); S. Rep. No. 338, 76th Cong., 1st Sess. 2 (1939) (showing contemporaneous congressional understanding that prohibiting radio advertising of alcohol beverages "would not affect any right of free speech").

accomplish its ends. *See Sable*, 492 U.S. at 129-32; *Bolger*, 463 U.S. at 70-71.[33]

Second, it is obvious that the labeling prohibition prevents many people from having access to information they would use responsibly. Indeed, the district court found *as a fact* that

> [C]itizen's . . . want the information; and the indication is they want it not to drink higher-alcohol beer but to be more responsible and for many to reduce the alcoholic content of what they're drinking . . . before they step into a car and subject themselves to the laws of the various states relating to driving under the influence or driving while ability impaired. It's extremely important that they be able to know the content of what they're drinking. Pet. App. 37a.[34]

The government implicitly concedes as much, asserting only that there is "a *particular type* of beer-drinker . . . who . . . would choose a beer based on its high alcohol strength." Pet. Br. 35 (emphasis added). But that justification is like prohibiting new car stickers from listing horsepower because some consumers would choose high horsepower cars, even though most consumers would choose lower horsepower fuel-efficient cars, or like ban-

[33] The government's suggestion that the post-1935 introduction of bills in Congress warrants deference ignores the well-settled understanding that Congressional *inaction* is not a sound basis for construing legislative intent. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle"); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 332 n.24 (1981). Neither bill cited by the government ever came to a vote in either the House or the Senate. Nor is there firmer support for the government's suggestion that the Court should abdicate its responsibility to strike down laws that violate the First Amendment, and should simply wait until Congress decides to repeal the law. Pet. Br. 30 n.23.

[34] The district court's finding was based on substantial evidence. *See, e.g.*, Tr. 176 (Rechholtz) ("consumers . . . desire to go to a

ning speedometers because some drivers might use the information to speed. J.A. 156 (Ambler).[35] Such "[b]road prophylactic rules . . . may not be so lightly justified." *Ibanez*, 114 S. Ct. at 2089.

Just as the "government may not reduce the adult population to reading only what is fit for children," *Bolger*, 463 U.S. at 73 (quotation omitted), a government policy that deprives responsible adults of factual information that can help them make important health and safety decisions must be viewed as extremely suspect. "The First Amendment . . . requires us to assume . . . that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[36] As we will now show, the gov-

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lighter or lower alcohol product in the interest of moderation, in the interest of better dealing with responsible behavior"); Porter Dep. 58 ("there is an increasing awareness of the need for moderation").

[35] Several states have determined that consumers have a legitimate interest in knowing when they are drinking malt beverages that are *above* the lowest range of alcohol strength for malt beverages. Oregon, for example, requires all malt beverages above 4% alcohol by volume to disclose alcohol content on their labels. Montana requires label disclosure of alcohol content for malt beverages over 7% alcohol by weight. Arkansas requires malt beverages containing more than 5% alcohol by weight to so state. Other states require malt beverages below 4% to be labeled so consumers can distinguish lower strength from higher strength products. *See* Statutory Appendix to this brief.

[36] *Bolger*, 463 U.S. at 79 (Rehnquist, J., concurring in the judgment) (quotation omitted). Indeed, such a disproportionately adverse impact on beneficial speech would arguably fail the "narrow tailoring" requirement even if there were no alternative regulatory options. Here, as we will show, such options were readily available. *See generally id.* at 79 (Rehnquist, J., concurring in the judgment) (agreeing that the flat ban on direct mail advertising of contraceptives was unconstitutional and noting that although the ban advanced the government interest in permitting parents to guide their children's education concerning contraception, it also inhibited that interest by depriving parents of access to information "that might help them make informed decisions.").

ernment's argument is simply "insufficient to warrant the sweeping prohibition" of accurate, factual alcohol content disclosures on malt beverage labels. *Bolger*, 463 U.S. at 75.

B. The Government Could Use Effective But Less Restrictive Alternatives.

1. *The government could directly regulate the conduct of brewers.*

The government concedes that it could directly and effectively prevent strength wars without any suppression of speech whatsoever: "If Congress's sole purpose had been to curb strength wars among malt-beverage brewers, it might well have enacted a different statute. For example, Congress might have chosen to limit the alcohol content of malt beverages. That limitation would have directly furthered the goal of preventing strength wars." Pet. Br. 24. *See* Petition at 15 n.15 (Congress has the power to impose such a limit). That concession fatally undermines the government's case. Such a regulation could be easily enforced and would burden only the *conduct* of producers. It would not burden the rights of producers to speak or of consumers to hear.

The government lamely seeks to justify its choice of speech regulation over conduct regulation by arguing that a direct federal limit on alcohol content would "have interfered with the State's authority to regulate alcoholic beverages (by devising their own limits on alcohol content or choosing to impose no such limits)." Pet. Br. 24-25.[37] That is no answer. The government could serve *both* interests simply by imposing a federal limit on alcohol content but allowing an exception for states that prefer higher or lower limits.[38] Because Congress could

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[37] Several states have imposed maximum limits on alcohol content for some or all malt beverages. Pet. Br. 4, n.2; J.A. 357-360.

[38] Depending on the degree to which Congress wished to accommodate state regulation of alcohol, such an exception could exempt

accommodate state policy and curb strength wars at least as effectively by regulating brewers directly as by suppressing speech, the First Amendment requires that it do so. *Discovery*, 113 S. Ct. at 1509-10, 1514 (invalidating speech regulation where city could easily and more directly have furthered its interests by regulating conduct).[39]

2. *The government could regulate speech more narrowly.*

Alternatively, the government could impose one of several substantially narrower restrictions on speech. The government could simply prohibit marketing efforts that attempt to promote malt beverages (or any alcohol beverages) by emphasizing high strength. Such regulation has been successfully used in other countries. J.A. 41-42, 188-190 (Ambler) (discussing the codes used in the United Kingdom, Canada, and Denmark), 202 (UK Code C.XII § 5.4.1). The government relies exclusively on similar regulations to regulate the marketing of wine. J.A. 223 (Cates). Moreover, ATF representatives testified that ATF can effectively determine when manufacturers are promoting their products on the basis of

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only states that had enacted positive law inconsistent with the federal limit, or could exempt all states that, absent the federal law, would permit stronger malt beverages.

[39] Even in *Posadas*, it was undisputed that there was no direct regulation of conduct that could have effectively accomplished the government's purposes. Prohibiting casino gambling altogether would have frustrated the government's pursuit of tourist income. No party even argued that residents could have been selectively prohibited from casino gambling, and Puerto Rico explained that such a prohibition would have been almost impossible to enforce. Appellee's Br., No. 84-1903, at 44. The one alternative suggested, an upper limit on gambling by residents, would obviously have been less effective, and arguably completely unworkable. Whether the limit would be per bet, per day, or per year was not specified, nor how it would be tracked or enforced.

strength, has been able to prevent strength wars in the wine and spirits industries (where alcohol content disclosure is mandatory), and has effectively policed strength promotions in the malt liquor market. J.A. 209, 211, 212-14, 221, 223 (Cates); Black dep. 70-71. *See also* Pet. App. 38a.

Similarly, even if there were support for the government's prediction that simply permitting labels to disclose *factual* information would lead to strength wars in the "malt liquor" segment of the market—and there is not —Section 205(e)(2) is a vastly over-inclusive response. The government could have limited the labeling ban to these malt liquor products. A supposed concern about a small fraction of the market cannot justify a labeling ban that covers all malt beverages. In sum, the government may not "completely suppress information when narrower restrictions on expression would serve its interests as well." *Central Hudson*, 447 U.S. at 565; *see also In re R.M.J.*, 455 U.S. 191, 207 (1982).

III. THERE IS NO BASIS FOR SUBJECTING SECTION 205(e)(2) TO A LESS DEMANDING STANDARD OF REVIEW.

There is no support in this Court's precedent or First Amendment doctrine for the government's final argument —that a less demanding standard should apply.

A. *Posadas* Did Not Establish a Lesser Standard for Reviewing This or Any Other Restriction on Commercial Speech.

Contrary to the government's assertion, this Court has never embraced the proposition that commercial speech about "a socially harmful activity . . . warrants even less protection under the First Amendment than other forms of commercial speech." Pet. Br. 41. *Posadas* held only that a government's interest in discouraging certain types of gambling by residents is legitimate and substantial and that banning advertising urging residents to engage in the

disfavored activity would directly and materially advance that goal. *Posadas*, 478 U.S. at 328, 341-42. *Posadas*'s conclusion that Puerto Rico's ban on promotional *advertising* would advance *its* interest in discouraging gambling has no bearing on whether the federal government's quite different ban of factual *label* disclosures will advance its quite different interest in preventing strength wars.

The government's suggestion, Pet. Br. 40, that the power to prohibit alcohol beverages altogether gives the federal government the power to suppress any related commercial speech completely misconstrues *Posadas*. The language on which the government relies purported *only* to distinguish Puerto Rico's ban from the bans invalidated in *Carey* and *Bigelow*[40]. The appellant had cited these decisions for the proposition that "[i]f an activity is legal, the state cannot prohibit advertising it."[41] The Court explained that those cases were "inapposite" because "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State" under constitutional provisions other than the First Amendment. *Id.* at 345-46. The Court went on to note that, in contrast, the conduct at issue in *Posadas*—gambling—could have been made unlawful, in which case speech proposing such unlawful activity would not be entitled to the protections of the commercial speech doctrine.

Posadas did *not* hold, however, that the unexercised power to ban casino gambling removed speech proposing casino gambling from all protection of the commercial speech doctrine, or justified a less demanding standard of review than the standard identified in *Central Hudson*. To the contrary, because Puerto Rico had not made casino gambling unlawful, speech proposing casino gambling *did* concern "lawful activity," *Posadas*, 478 U.S. at 340, and

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[40] *Carey v. Population Services International*, 431 U.S. 678 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[41] Brief for Appellant in No. 84-1903, at 35.

the Court therefore analyzed Puerto Rico's advertising ban under each prong of the *Central Hudson* test.[42] Likewise, *Edge Broadcasting* analyzed the federal lottery advertising rule under each prong of the *Central Hudson* test,[43] and declined to decide whether a lesser standard was appropriate.[44] Indeed, this Court has never held that *any* commercial speech about *any* lawful activity was subject to scrutiny less searching than that required by *Central Hudson*. In particular, this Court has never adopted the "reasonable basis" test the government appears to urge, Pet. Br. 35, because such a test would effectively eliminate First Amendment review. As noted, the Court has expressly rejected rational basis review in commercial speech cases. *Discovery*, 113 S. Ct. at 1510 n.13; *Fox*, 492 U.S. at 480. The whole purpose of First Amendment review—whether strict scrutinty or intermediate scrutiny —is to require the government to meet a higher standard before it is permitted to suppress speech than it is required to meet when regulating conduct.

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[42] *Id.* at 344 ("we conclude that the statute and regulations at issue . . . pass muster under each prong of the Central Hudson test").

[43] *See Edge Broadcasting*, 113 S. Ct. at 2699-2708 (Souter, concurring in part). Significantly, the Court applied the *Central Hudson* test to the federal ban at issue there even though the ban applied only to broadcasters located in states where gambling not only could be declared unlawful, but *had* been declared unlawful. Here, no state has declared the consumption of alcohol to be unlawful.

[44] 113 S.Ct. at 2703. The government had argued that "the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement" so that the Court "need not proceed with a Central Hudson analysis." *Id.* Such a rule would vitiate First Amendment protection of commercial speech. Few products or services are themselves constitutionally protected. Under the government's interpretation, Congress could therefore ban advertising—or impose any restriction on related commercial speech—about virtually any product or service. For example, under such a rule, because Congress can prohibit the sale of pharmaceuticals, it could ban advertisements listing pharmaceutical prices. *Cf. Virginia Pharmacy*, 425 U.S. at 773.

Accordingly, the Court should reject the government's appeal for a new constitutional rule creating multiple levels of scrutiny (and, effectively, *no* First Amendment scrutiny) based on judicial policy judgments about the social value of particular commercial activities. As a jurisprudential matter, such a rule would require virtually endless line-drawing. Even if a lesser level of scrutiny were considered appropriate for speech about casino gambling, which is deemed harmful and therefore banned in nearly all states, would the same scrutiny be appropriate for speech about malt beverages, which are banned in none, are consumed by 80 million adult Americans,[45] and are sold by the federal government at every military base? Is a strength war among brewers more or less socially harmful than *de facto* segregation hastened by "For Sale" signs or overconsumption of electricity? *Cf. Linmark*; *Central Hudson.* The taxonomy of "social harm" has no limiting principle.

Furthermore, it is unclear what social purpose would be served by abandoning review of the fit between suppression of the speech at issue and the interest it is alleged to serve, as the government urges. Pet. Br. 39, 41. That certain conduct is harmful may be enough to demonstrate that the government has a substantial interest in limiting it, but does *not* demonstrate that the particular means chosen will, in fact, do so, without inordinate cost. Just because the government has a target does not mean it is shooting in the right direction, or that it should be permitted to use exploding shells when an arrow would do.

If the government is not required to demonstrate that its regulatory choice would directly and materially advance its asserted interest without burdening substantially more speech rights than necessary, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on

[45] *See amicus* brief of The Beer Institute (No. 93-1631).

commercial expression." *Edenfield*, 113 S. Ct. at 1800. It is not surprising that the legislative and executive branches of government, from time to time, strain at the limitations on their power imposed by our regard for free expression. That is why we have the First Amendment.

B. The Twenty-first Amendment Does Not Justify a Lesser Standard for Reviewing This or Any Other Restriction on Commercial Speech.

1. *The ban at issue is* federal *law.*

The Twenty-first Amendment cannot possibly justify a less demanding standard of review for Section 205(e)(2) because the Twenty-first Amendment is not an affirmative grant of power to the federal government. To the contrary, it *restricts* federal authority by granting certain enumerated powers to the states.[46] Section 205(e)(2) is a federal law, interpreted and enforced by a federal agency. Nothing in the text of the Amendment, its history, or this Court's precedent provides support for the view that the Twenty-first Amendment cloaks such a law with any added presumption of validity.

2. *The Twenty-first Amendment does not supplant or modify First Amendment restraints even on state law.*

It is settled that the Twenty-first "Amendment does not license the states to ignore their obligations under other provisions of the Constitution." *Crisp*, 467 U.S. at 712. Instead, "the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 712 (quotation omitted).[47] "Once passing beyond consid-

[46] "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." United States Constitution, XXI Amendment, § 2.

[47] Even the Twenty-first Amendment's restriction on the federal government's power under the Commerce Clause does not

eration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. . . . Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren,* 429 U.S. 190, 206 (1976) (quotation omitted). Thus, in *Craig* the Court held that "the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case." *Id.* at 209-10.[48] Similarly, states "may not exercise [their] power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); *see also Dep't of Revenue v. James Beam Co.*, 377 U.S. 341 (1964) (Export-Import Clause); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) (Due Process Clause).

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repeal the power of federal legislation to preempt state legislation. It "merely requires that each provision be considered in light of the other." *Craig v. Boren,* 429 U.S. at 206. Many state liquor regulations have been found invalid as inconsistent with legislation enacted by the federal government under the Commerce Clause. *See, e.g., 324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987) (liquor pricing system); *Crisp* (ban on alcohol beverage advertising); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) (liquor tax); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.,* 445 U.S. 97 (1980) (liquor pricing system).

[48] In reviewing the differential treatment of men and women under the Equal Protection Clause, *Craig v. Boren* applied the requisite intermediate level of scrutiny—whether the statute was substantially related to achieving important government objectives—a test virtually identical to that applicable to restrictions of commercial speech. 429 U.S. at 197. If the Twenty-first Amendment does not justify relaxation of the intermediate standard of review under the Equal Protection Clause of the Fourteenth Amendment, it also cannot justify relaxation of the intermediate standard of review under the First Amendment.

Thus, even if Section 205(e) were treated as though it were a state law, the government is simply wrong in arguing that the Twenty-first Amendment alters the First Amendment standards that would otherwise govern this case. *California v. LaRue*, 409 U.S. 109 (1972), does not even remotely support that argument. The regulation upheld in *LaRue* was valid under the First Amendment, without regard to the Twenty-first Amendment. The regulation barred nude dancing in bars with state liquor licenses—conduct "only marginally . . . within the outer perimeters of the First Amendment."[49] It was expressly aimed at the secondary effects of that conduct, *see* 409 U.S. at 111 (referring to prostitution, rapes, and assaults), and was therefore "justified without reference to the content of the regulated speech," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). Furthermore, the regulation deterred "the commission of public acts that may themselves violate valid penal statutes," 409 U.S. at 117, and was therefore "unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). To the extent the regulation carried an "added presumption of validity," that was because it regulated *conduct* at the heart of the state's Twenty-first Amendment power. The opinion did not purport to suggest that all regulation of *speech* related to alcohol beverages should be subjected to deferential review. Indeed, the Court has cited *LaRue* for precisely the opposite proposition. *See Crisp*, 467 U.S. at 712.

In contrast, Section 205(e) directly affects printed speech that concededly provides important and truthful consumer information. It expressly prohibits manufacturers from placing accurate, factual information on printed labels *because the government does not want consumers to have that information.*[50] Moreover, even a state statute

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[49] *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2457 (1991).

[50] As *LaRue* makes clear, "the scope of permissible state regulations significantly" decreases when the "mode of expression" is not

restricting labeling would not implicate the "core § 2 power" conferred by the Twenty-first Amendment. *See Crisp,* 467 U.S. at 713. Like the advertising ban invalidated in that case, a labeling ban "engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 715.

Thus, if challenged, a state ban on alcohol content labeling of malt beverages would be subject to the same standard of review as is the federal ban at issue here. And if the state's justification for such a ban were an asserted interest in preventing strength wars, on this record such a ban would plainly fall, just as the federal ban must fall.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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potentially expressive conduct but "the printed page." 409 U.S. at 117.

STATUTORY APPENDIX

STATUTORY APPENDIX [1]

Note: Some states measure alcohol content by weight and some by volume. A rough translation of alcohol by weight into alcohol by volume is obtained by dividing the percentage of alcohol by weight by .8. For example, a beverage that is 3.2% alcohol by weight is approximately 4% alcohol by volume.

ALABAMA

No advertising rule.

Required to file federal certificate of label approval. Ala. Code § 28-3A-6(c) (1975).

ALASKA

No advertising rule.

No labeling rule.

ARIZONA

No advertising rule.

Beer must be "labeled in conformity with the labeling regulations prescribed by the Federal Alcoholic Administration Act or any other Regulations adopted by the Federal Alcoholic Administration or any other Regulations adopted by the government of the United States, officer, bureau, or agency thereof. Any amendments or changes in the Federal Alcohol Administration Act or any other Regulations adopted by the government of the United States, officer, bureau or agency thereof pertaining to labeling are hereby made a part of this regulation without further adoption by the Department." Ariz. Comp. Admin. R. & Regs. R4-15-220 (6) (Supp. 1982).

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[1] This Appendix is intended as a general summary only. State law on these subjects is composed of administrative regulations, emergency orders, attorney general opinions, administrative bulletins, and administrative rulings, as well as statutes, and is constantly changing.

ARKANSAS

Licensee may not violate or fail to comply with federal advertising regulations. Title 1, Subtitle G., § 1.78(1); point of sale advertising must conform with current federal regulations. Alc. Bev. Control. Regs § 2.28(4) (1991). Malt liquor or stout beer containing more than 5% alcohol by weight must so state on container. Ark. Alc. Bev. Cont. Div. Regs § 2.17 (1991).

CALIFORNIA

No advertising rule.

Malt beverage products that exceed 4% alcohol content by weight must bear a label that designates the contents as ale, porter, brown, stout, or malt liquor. Bottled or canned ale, porter, brown, stout, or malt liquor of 4% or less alcohol by weight must bear a label certifying that the alcoholic content is no greater than 4%. Cal. Code Regs. tit. 4, § 130 (1994).

By emergency regulation earlier this year, California eliminated its prohibition against alcohol content disclosures on labels of malt beverages exceeding 4% alcohol content by weight. The Department of Alcoholic Beverage Control explained that it was "convinced that it is in California consumers' best interest, as well as sound public policy, to have the percentage of alcohol in malt beverages displayed on the product label." OAL File No. 94-0224-03 E (Feb. 16, 1994).

COLORADO

No advertising rule.

Malt beverages containing not more than 3.2% alcohol by weight must so state on the container. Colo. Code Regs. § 46-112.3.

CONNECTICUT

No advertising rule.

Adopts "[r]egulations of the federal alcohol administration currently in effect relating to labeling. . . ." Conn. Agencies Regs. § 30-6-A35(m) (1976).

DELAWARE

No advertising rule.

Labels must conform with federal laws and regulations. Del. Alc. Bev. Control Comm. R. 13(b) (1992).

DISTRICT OF COLUMBIA

Prohibits any false use of words suggesting high alcohol content in beer advertising. D.C. Mun. Regs. tit. 23, § 1103.18 (1988).

Prohibits descriptive terms suggesting high alcohol content. D.C. Mun. Regs. tit. 23, § 910.3(b) (1988).

FLORIDA

Adopts federal regulations regarding advertising. Fla. Admin. Code § 61A-4.058(1).

Labels must meet all federal labeling requirements. Malt beverages containing not more than 3.2% alcohol by weight *may* disclose alcohol content or accurate information about such alcohol content. Fla. Admin. Code § 61A-4.006(1).

GEORGIA

No advertising rule.

No labeling rule.

HAWAII

No advertising rule.

Labels shall "conform in all respects to the then existing federal laws and regulations regarding such labels." Haw. Rev. Stat. § 281-74 (1992).

IDAHO

"Except as permitted by federal statute and regulations, there shall be no public advertisement or advertising of alcoholic liquors in any manner or form within the state of Idaho." 23-607 ¶ 7087.

No labeling rule.

ILLINOIS

Advertisements shall not refer to alcoholic content. Ill. Admin. Code tit. 11, § 100.50(b)(3) (1991).

"Federal Alcohol Administration Regulation No. 7 relating to the labeling of wine, distilled spirits and malt beverages (27 CFR 7, April 1993, not including any later amendments or editions), are hereby adopted and made a part of this Rule. . . ." Ill. Admin. Code tit. 11, § 100.70(b)(1) (1991).

INDIANA

It is unlawful to advertise the percentage of alcohol in beer. Ind. Code Ann. § 7.1-5-2-2 (Burns 1994).

Malt beverage labels may not show alcoholic content by percentage or by words indicating "potency" or "strength". Alc. Bev. Comm'n of Ind. Bull. 23 (Aug. 4, 1938).

IOWA

No advertising rule.

No labeling rule.

KANSAS

No advertising rule.

Cereal malt beverages containing no more than 3.2% alcohol by weight must so state on label. Kan. Admin. Regs. 14-6-4(4) (1992). Malt beverages containing 2% or less alcohol by weight may bear labels so stating. Kan. Admin. Regs. 14-2-16 (1992).

KENTUCKY

Prohibits any advertisement or label of a malt beverage "which refers in any manner to the alcoholic strength of the malt beverage" including "words or numerals likely to be considered a statement of alcoholic content, unless the words or numerals are adequately explained." Ky. Rev. Stat. Ann. § 244.520 (Michie 1993).

Statements of percent of alcohol by volume are permissible. Op. Ky. Atty. Gen. 94-50 (1994).

LOUISIANA

No advertising rule.

No labeling rule.

MAINE

Prohibits any advertisement of a malt beverage which refers in any manner to its alcohol. Maine Rev. Stat. 28-A § 711 (1994).

"This paragraph does not prohibit the inclusion of the alcoholic content of the malt liquor on the product label." *Id.* No labeling prohibitions.

MARYLAND

No advertising rule.

No labeling rule.

MASSACHUSETTS

No advertising rule.

"All malt beverages containing not more than three and two tenths percent of alcohol by weight shall be so labeled." Mass. Gen. Laws Ann. ch. 138 § 15 (1991). "Every manufacturer licensed by the Commission shall place on the brand labels all information required by Federal regulations." Mass. Regs. Code tit. 204, § 2.06(1) (1986).

MICHIGAN

Advertisements and labels must comply with federal law. Mich. Admin. Code r. 436.1303, 436.1611(1) (1993).

MINNESOTA

Advertisements of beer containing more than 3.2% alcohol by weight shall not contain statements of alcohol content. Minn. R. 7515.0750(C) (1985).

Malt beverages containing more than .05% but not more than 3.2% alcohol by weight must state they contain not more than 3.2% alcohol by weight on the container. Minn. R. 7515.1100 subp. 2 (1992).

Labels must otherwise comply with federal law unless inconsistent with Minnesota law. Minn. R. 7515.1080 (1992).

MISSISSIPPI

No advertising rule.

Prohibited to refer to alcohol content on label, except to indicate that beer contains less than 4% alcohol by weight (and thus in conformity with law prohibiting sale of beer exceeding 4% alcohol). Miss. Code Ann. § 27-71-509 (1989).

MISSOURI

In advertisements for malt beverages not more than 3.2% alcohol by weight, alcoholic content "shall be stated in the manner and form in which it appears on the labe[l]" of the beverages advertised. Mo. Code Regs. tit. 11, § 70-2.240 (1993).

Malt beverages not more than 3.2% alcohol by weight must so state on the label. Mo. Ann. Stat. § 312.310(2) (1994).

MONTANA

Regulations nos. 4, 5, and 7 . . . as set forth in 27 C.F.R., and amendments thereof and supplements

thereto are hereby adopted and are made part hereof as though fully set forth herein, as the regulations for the labeling and advertising of liquor (distilled spirits, wine, and malt beverages) sold within this state except insofar as the provisions of such regulations may be contrary to or inconsistent with the provisions of Montana law or regulations of the department." Mont. Admin. R. 42.13.221 (1993).

Alcoholic content by weight must be noted on labels of malt beverages containing more than 7% alcohol by weight. Mont. Admin. R. 42.13.201(2) (1993).

NEBRASKA

No advertising rule.

Disclosure of alcohol content on malt beverage labels not required. Neb. Admin. R. 227-LCC4-001.01B.

NEVADA

No advertising rule.

No labeling rule.

NEW HAMPSHIRE

"All liquor and beverage advertising, or any claims for liquor or beverage advertising shall conform with the standards set forth in regulations under the provisions of the FAAA." N.H. Rev. Stat. Ann. § 179.31(VI).

No labeling rule.

NEW JERSEY

No advertising rule.

"Federal regulations, as amended or supplanted from time to time, relating to labeling . . . of . . . malt

alcoholic beverages . . . are made a part hereof. . . ." N.J. Admin. Code tit. 13, § 2-27.1 (1990).

NEW MEXICO

No advertising rule.

No labeling rule.

NEW YORK

No statement regarding alcohol content permitted in advertising, except beer containing less than 2.5% alcohol by volume may be advertised as "low alcohol" or "reduced alcohol". N.Y. Alco. Bev. Cont. Law § 84.6 (1994).

No statement regarding alcohol content permitted in labeling, except beer containing less than 2.5% alcohol by volume may be labeled "low alcohol" or "reduced alcohol". N.Y. Alco. Bev. Cont. Law § 84.6 (1994). Labeling of malt beverages must be in accordance with the FAAA and FAAA regulations. N.Y. Admin. Code tit. 9, § 84.1 (1994).

NORTH CAROLINA

Advertising (defined as excluding labels) "shall conform with the standards set forth in regulations under the provisions of the Federal Alcoholic Administration Act except where they conflict with the rules of the Commission." N.C. Admin. Code tit. 4, r.2S.1004(e).

Advertisements and labels shall not contain words such as "high test," "high proof," "full strength," "extra strong" or "similar descriptive terms.' N.C. Admin. Code tit. 4, r.2S.1005(17). No further labeling rules.

NORTH DAKOTA

No advertising rule.

No labeling rule.

OHIO

No advertising rule.

No labeling rule.

OKLAHOMA

No advertising rule.

Label of malt beverage containing more than .5% alcohol by volume but not more than 3.2% alcohol by weight may not indicate the alcohol content, or suggest that content is more than 3.2% by weight, or include words such as "strong," "high test," "full strength." Okla. Stat. Ann. tit. 37, § 163.19(b) (1993).

OREGON

No advertising rule.

Alcohol content must be listed on label of beer containing more than 4% alcohol by weight. Or. Admin. R. 845-10-205(4) (1992).

PENNSYLVANIA

Prohibited to refer to alcoholic content in advertisement for any malt or brewed beverage. Pa. Cons. Stat. § 493(8) (1993).

Prohibited to refer to alcoholic content on label of any malt or brewed beverage. Pa. Cons. Stat. § 493(7) (1993).

RHODE ISLAND

No advertising rule.

No labeling rule.

SOUTH CAROLINA

No advertising rule.

Prohibited to sell beer "unless labeled in accordance with the provisions of the Federal Alcoholic Administration Act and rules and regulations promulgated thereunder." S.C. Code Ann. § 61-13-800 (Law. Co-op. 1991).

SOUTH DAKOTA

No advertising rule.

"Compliance with the uniform labeling regulations established by the federal secretary of the treasury is in compliance with the labeling requirements of this chapter." S.D. Codified Laws Ann. § 39-13-11 (1993).

TENNESSEE

No advertising rule.

No labeling rule.

TEXAS

Advertising alcoholic content of malt beverages prohibited. Tex. Admin. Code tit. 16, § 45.90(c) (1991); Tex. Alco. Bev. Code § 108.01(a)(4) (1994).

Prohibition against labeling alcohol content of malt beverages repealed by Law 1993, H.B. 1445, approved June 19, 1993, eff. Sept. 1, 1993.

UTAH

Federal labeling and advertising regulations are adopted and incorporated by reference to regulate the labeling and advertising of alcoholic beverages sold within the state, except where the provisions of the federal regulations may be contrary to or incon-

sistent with the provisions of Utah law, or rules of the commission. Utah Admin. R. 96-1-7(2)(d) (1992).

VERMONT

"Federal regulations relating to the advertising" of malt beverages "promulgated under" the FAAA "as now existing or as amended in the future, are hereby adopted as part of this regulation. . . ." Vt. Admin. Comp. Liquor Control Board Reg. "Advertising" § 1 (1993).

No labeling rule.

VIRGINIA

Advertising may not refer to intoxicating effect of alcohol beverages. VR 125-01-2, § 1 (1994). No prohibition of alcohol content disclosures in advertising. "All beer sold in the Commonwealth shall conform with regulations adopted by the appropriate federal agency, relating to labels, definitions and standards of identity. Applicants shall submit a certified copy of the approval of the label by such federal agency." VR 125-01-4, § 5(A)(3) (1994).

WASHINGTON

Retailers who offer for sale both malt beverages under 4% alcohol by weight and over 4% alcohol by weight, packaged identically, must separate the two strengths in their displays and identify by point-of-sale advertising which is the higher strength and which is the lower strength. Wash. Admin. Code § 314-52-010(4) (1994).

No labeling rule.

WEST VIRGINIA

No advertising rule.

No labeling rule.

WISCONSIN

No advertising rule.

Requires compliance with federal labeling requirements. Wis. Admin. Code § (Dep't of Revenue) 7.21 (1991).

WYOMING

Federal regulations relating to the advertising of alcoholic beverages promulgated under "the FAAA" are adopted as part of these rules to the same extent as if set forth and shall govern the advertising of alcoholic beverages . . . in Wyoming." Wyo. Liquor Comm., Chap. II, § 8(a) (1985).

No labeling rule.

Generally Brewers May Advertise Alcohol Content, But Not Disclose It On Labels				**Generally Brewers May Neither Advertise Nor Label Alcohol Content**	
State: No Advertising or Label Prohibitions	*State: No Advertising Prohibitions, Some Labeling Requirements*[1]	*State: No Advertising Prohibitions, Limited Labeling Prohibition*	*State: No Advertising Prohibitions, Federal Label Rule Incorporated*	*State Advertising and Labeling Prohibitions*	*State Advertising Prohibitions But No State Labeling Prohibition*
Alaska	California	Mississippi	Alabama	Florida[2]	Arkansas[3]
District of Columbia[4]	Colorado	Oklahoma	Arizona	Illinois	Idaho
Georgia	Kansas		Connecticut	Indiana	Maine
Iowa	Massachusetts		Delaware	Michigan[2]	New Hampshire[2]
Kentucky	Missouri		Hawaii	Minnesota	North Carolina[2,4]
Louisiana	Oregon		New Jersey	Montana[2]	Texas
Maryland			South Carolina	New York	Vermont[2]
Nebraska			South Dakota	Pennsylvania	Wyoming[2]
Nevada			Virginia	Utah[2]	
New Mexico			Wisconsin		
North Dakota					
Ohio					
Rhode Island					
Tennessee					
Washington					
West Virginia					

1. Colorado, Kansas, Massachusetts, and Missouri require beer labels to disclose some alcohol content information at low end of spectrum; Oregon requires beer labels to disclose alcohol content at middle or high end. California also requires high strength malt beverages to carry names other than "beer."

2. State adopts federal law governing advertising of malt beverages generally. Because this may constitute state incorporation of substantive restrictions, it is included as a state with such restrictions.

3. Arkansas requires malt beverage labels to disclose when alcohol content exceeds 5% by weight.

4. State prohibits descriptive terms in advertising and on labels but not factual statements of alcohol content.